a

M & W ZANDER (M) SDN BHD

v.

DIRECTOR GENERAL OF INLAND REVENUE

b

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[JUDICIAL REVIEW NO: 07-2004-I]
4 JANUARY 2005

c

ADMINISTRATIVE LAW: *Judicial review - Application for - Leave to commence proceedings against Director General of Inland Revenue to protect interest of applicant - Whether Inland Revenue Board's action resembled a decision or sub-decision - Absence of decision by Director General - Rules of the High Court 1980, O. 53 r. 2(4) - Whether applicant acquired status or right against Director-General - Whether applicant had arguable case for*

d

review - Whether there was locus standi - Whether application premature and an abuse of the process of the court

This was an application for leave to commence proceedings for judicial review against the Director General of Inland Revenue ('the Director General') in order to determine the true and correct position of the law for the guidance

e

of the Inland Revenue Board ('the Board') and thereby to protect the interest of the applicant. The facts were that the Board had refused to change its position on the disputed principles on which the applicant's tax was being computed. It was the applicant's submission that if the Director General proceeds to make an assessment of income tax payable to the applicant, he

f

would be acting in excess of jurisdiction on erroneous principles of law. On opposing the grant of leave, the senior federal counsel on behalf of the federal attorney-general argued that there was no decision or assessment made by the Director General under s. 91 of the Income Tax Act 1967 ('the Act'). Therefore, the applicant had not been adversely affected by any decision of

g

the Director General which was amenable to review by the court.

Held (dismissing the application):

[1] The action of the Board in computing the applicant's chargeable income on certain principles and its refusal to budge from those principles did

h

not resemble a decision or sub-decision within the meaning of O. 53 r. 2(4) of the Rules of the High Court 1980. There was no sub-decision made in this case which would strongly influence the Director General in making his assessment. (p 351 f-h)

i

[2] The applicant had not acquired any status or right against the Director General *vis-à-vis* the Income Tax Act which required to be protected by declaratory orders. In the absence of a decision by the Director General, the applicant not only lacked a sufficient interest or *locus standi* to make this application, but that its application was premature. Further, the applicant had failed to show an arguable case for review. Hence, this application was frivolous, vexatious and an abuse of the process of the court. (pp 353 b-c & 354 e-f)

Case(s) referred to:

Arumugam Pillai v. Government of Malaysia [1975] 2 MLJ 29 ***(refd)***

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

Council of Civil Service Union & Ors v. Minister for Civil Service [1984] 3 All ER 935 ***(refd)***

Datuk Syed Kechik v. Government of Malaysia [1979] 2 MLJ 101 ***(refd)***

Dr Amir Hussein Baharuddin v. University Sains Malaysia [1989] 3 MLJ 298 ***(refd)***

General Commissioners for Purposes of Income Tax For Kensington v. Aramoyo [1916] AC 215 ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 2 MLJ 185 ***(refd)***

Hjh Halimatussadiah Hj Kamaruddin v. Public Service Commission [1994] 3 CLJ 532 SC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Noh Abdul Aziz v. Director of Lands and Surveys, Kota Kinabalu [1999] 6 MLJ 772 ***(refd)***

R v. Agricultural House Advisory Committee for Bedfordshsire, Cambridge and Northamptonshire ex parte Brough 19 HLR 367 ***(refd)***

R v. Boycott [1939] 2 All ER 626 ***(refd)***

Sivarasa Rasiah v. Badan Peguam Negara [2002] 2 CLJ 697 CA ***(refd)***

Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor [1998] 3 CLJ 85 CA ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 HC ***(refd)***

The King v. Electricity Commissioners [1924] 1 KB 171 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 33(1), 39, 91, 99
Rent (Agriculture) Act 1976, s. 29
Rules of the High Court 1980, O. 53 rr. 2(4), 3(5), (6), 4

For the applicant - Colin Lau; M/s Michael Ong & Chang
For the Federal Attorney-General - Azizah Nawawi SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner J:

This is the hearing of an application by M & W Zander (M) Sdn Bhd (hereafter 'the applicant') for leave to commence proceedings for judicial review against the Director General of Inland Revenue (hereafter 'the Director General').

On 28 October 1998 a company called 1st Silicon (Malaysia) Sdn Bhd (hereafter '1st Silicon') entered into a written contract ('the contract') with M & W Zander Facility Engineering GmbH & Co. KG ('M & W Germany') a company incorporated in the Federal Republic of Germany to design, manage and construct a Wafer Fabrication Facility at Sama Jaya, Kuching, Sarawak ('the project') to manufacture Semi-conductor computer chips. On 3 November 2000 by a Deed of Assignment cum Novation, M & W Germany assigned unto the applicant absolutely, the contract it had entered into with 1st Silicon.

The applicant now seeks leave to apply for declaratory orders relating to its earnings under the contract in respect of the project. The applicant seeks to have it declared that under the contract no income has accrued to it which is chargeable to tax under s. 39 of the Income Tax Act 1967 ('the Act'), or that certain expenses and outgoings it claims to have wholly and exclusively incurred in undertaking the contract qualify as deductions under s. 33 of the Act in ascertaining its adjusted income, or that the Director General has acted on wrong principles in ascertaining the income of the applicant for the purposes of making or raising an assessment of any tax payable by the applicant in relation to the project it has undertaken.

The applicant also seeks an order of prohibition to prohibit the Director General from acting in contravention or in violation of any of the principles upon which its declarations are sought, in making an assessment of any tax payable by the applicant in connection with the project. The applicant also seeks an order that if leave is granted to it to bring proceedings for judicial review, such leave do operate as a stay against the Director General in respect of all acts in relation to or in the computation of assessment of any tax payable by the applicant in relation to or connection with the project.

The brief facts leading to this application for leave are these.

The applicant completed the project in about March 2002. Under the contract, the contract price for the project was to be subject to a Guaranteed Maximum Price ('the GMP') stated to be USD322 million, but which could be adjusted up or down under limited conditions specified in the contract. The applicant was entitled to be paid by 1st Silicon (a) a lump sum as Design and Management Fee, plus (b) the actual amounts payable to the applicant's sub-contractors deducting any discounts, provided the total did not exceed the GMP. Any savings of the total from the GMP were to be shared between 1st Silicon and the applicant. According to the applicant, the GMP was therefore a cap on the sums payable under the contract by 1st Silicon, and not the contract sum payable under the contract by 1st Silicon.

The project consisted of three components, namely:

Building and Facilities	USD243,774,919 (GMP)
Hook-up Works	USD 31,205,258
CIM & SMIF Automation	USD 47,322,616

The building and facilities component, which was referred to by all parties as the 'Base Build', consisted of all the building and facilities work. The applicant says that the scope of works and individual sub-contract packages for this component were identified at the time of contract, and consequently a GMP for this component was established at the time of contract.

The Hook-up Works consisted of connection of the various utilities, such as Bulk/Speciality Gases, Clean Dry Air, Plant Vacuum, Ultra Pure Water, Chemicals, Electrical, etc. to the manufacturing equipment installed in the project.

The CIM & SMIF Automation component consisted of the design, installation, implementation and integration services for what was essentially the computer integrated manufacturing and schemes employed in the project.

The applicant says that as the scope of works and individual sub-contract packages for the Hook-up Works and CIM & SMIF Automation components were not fully identified at the time of contract, the contract price stated for them in the contract were only budget amounts available at the time and they were treated as provisional sums to be expended in accordance with the terms of the contract. The applicant further says that the CIM & SMIF Automation components were subsequently taken out of the contract but the budget for this component was used for various items referred to as the Ancillary Items. The applicant maintains that each of these three components of the project

a are closely inter-related and interdependent in terms of design, technology and function and were to be built in continuous sequence. As such, the applicant maintains that the Building and Facilities, Hook-up and Ancillary Items formed one single and integral undertaking ie, the project.

b During the course of the project the applicant was paid progressively for works it had completed by 1st Silicon, who appointed Turner & Townsend (Malaysia) Sdn Bhd (hereafter 'T & T') as its agent for that purpose. T & T have valued payments due to the applicant as Interim Payments to a total of USD283 million. 1st Silicon has to date paid the applicant a total of USD282 million in relation to the said interim payments after deduction for retention. The c applicant says these interim certificates are the best evidence of the sums due to the applicant in each of the relevant years of assessment.

After the completion of the project in March 2002, the applicant submitted various final accounts prepared by the applicant for the project to T & T. d Thereafter, T & T produced its 'Assessment of Final Account and Final Statement' dated 9 April 2003 in which it only assessed a total final sum of USD250 million as payable to the applicant for the project, which sum is USD33 million less than the total interim payments certified previously. 1st Silicon thereupon indicated to the applicant that it would seek to recover the sum of USD33 million as excess payment. e

Various disputes and differences have arisen between 1st Silicon and the applicant including but not limited to disputes relating to the USD33 million allegedly overpaid to the applicant. In fact the applicant claims that it should be paid USD350 million for materials and works executed under the contract. f As a result 1st Silicon and the applicant have on 27 October 2004 agreed to submit all disputes and differences to arbitration by an arbitrator appointed by the Kuala Lumpur Regional Centre for Arbitration.

For the financial years 1999, 2000, 2001 and 2002, the applicant submitted the requisite returns to the Inland Revenue Board. According to the applicant g its returns were based on the applicant's audited accounts which were prepared by the applicant's accountants in accordance with relevant accounting standards relating to the treatment of revenue and costs for construction contracts which span different accounting periods. The applicant says that its returns were based on reliable estimates of revenue and costs at the time, in particular that the h contract revenue was expected to be USD322 million spread over the contract period. However, as it happened, the contract sums eventually paid by 1st Silicon were considerably less at USD282 million (less retention), which drastically changed the estimated revenue and costs which had been attributed to each of the accounting periods that made up the duration of the contract i period. This, according to the applicant, is why its audited accounts do not

properly reflect the revenue and costs (and therefore income or loss) that had been earned or incurred in these accounting periods, and which is relied upon by the Inland Revenue Board.

On 4 February 2004, officers of the Inland Revenue Board, Kuching, visited the applicant's offices in Kuching and seized various files and accounts books relating to the project. Since then various meetings have taken place between the applicant, its tax representatives and officers of the Inland Revenue Board.

As a result of these meetings it has become apparent that the applicant and the Inland Revenue Board compute the amount of tax payable by the applicant on differing principles because at a meeting on 4 October 2004 officers of the Inland Revenue Board allegedly requested the applicant to submit a re-computation of tax payable on the following principles:

(a) That the quantum of revenue to be recognised should be USD322 million. According to the applicant a computation of tax on this basis would be based on erroneous principles, in that, it fails to recognise that under s. 3 of the Act, income is chargeable to tax only when the applicant has obtained an unconditional right to receive it, which cannot be said to be the case here because:

(i) only a sum of USD250 million has been recognised by 1st Silicon in the final account as being due to the applicant;

(ii) only a sum of USD282 million (less retention) has been paid by 1st Silicon;

(iii) the sums recognised in its audited accounts are estimates based on the GMP sums and are qualified in the accounts;

(iv) 1st Silicon intends to recover USD33 million as excess payment which the applicant will resist and which dispute will proceed to arbitration.

(b) That the ascertainment of stage completion of the contract during each of the relevant years of assessment (necessary to determine what proportion of the contract revenue falls into each of those years of assessment) should be based on the 'costs basis' revenue recognition as opposed to the 'survey method' adopted by the applicant. During submissions counsel for the applicant indicated that the applicant is not pursuing its complaint on this disputed principle.

(c) That the Inland Revenue Board maintains that if income from the contract is recognised at anything less than the GMP of USD322 million, the allowable costs for the purposes of computation of income tax should be reduced correspondingly regardless of the fact that these costs were incurred by the applicant solely and exclusively in respect of the contract. According to the applicant, a computation of tax on the above basis would be based on erroneous principles because it fails to take cognizance of the effect of s. 33(1) of the Act as applied to the contract in that all outgoings and expenses wholly and exclusively incurred by the applicant in respect of the contract qualify as deductions in ascertaining the adjusted income of the applicant.

(d) That the Inland Revenue Board considers the Based Build, Hook-up Works and Ancillary Items components as separate parts of the project and ought to be taxed separately. According to the applicant, a computation of tax on the above basis would be based on erroneous principles, in that, it fails to recognise that on a proper construction of the contract, the above component of works are inseparable and or closely interrelated parts of one project to be performed in a continuous sequence and therefore ought not to be taxed separately.

The applicant has refused to re-compute its tax computations in accordance with the principles allegedly outlined by the Inland Revenue Board. Instead, the applicant re-submitted its tax re-computations based on those principles which it has outlined above, and which the applicant maintains the Director General should adhere to.

The difference between the computations of the applicant and the Inland Revenue Board are considerable. According to the applicant, there is '0' chargeable income for each of the relevant years of assessment while the Inland Revenue Board's re-computations initially showed a total of RM66 million as outstanding tax for the same years of assessment.

On 29 November 2004, at a meeting between officers of the Inland Revenue Board, the applicant and its tax representatives, the Inland Revenue Board refused to change its position on the disputed principles on which the applicant's tax was being computed and, according to the applicant, indicated that notices of assessment would be issued to the applicant. The applicant says that there is a grave danger that the Inland Revenue Board will immediately proceed to issue an assessment based on erroneous principles. Therefore on 7 December 2004 the applicant filed this application 'in order to determine the true and correct position of the law for the guidance of the Inland Revenue Board and thereby to protect the interest of the applicant'. For completeness, by letter dated 7 December 2004 the Inland Revenue Board revised the

computation of the applicant's tax to RM42 million, but this was not as a result of this application having been filed. It also needs to be mentioned that the applicant has undertaken a project in Kulim, Kedah, West Malaysia, for which it made a profit, but the applicant says that when the earnings of the Kulim project and this project are aggregated, the overall position remains the same ie, that of loss, so no income tax is payable by it. So much for the facts. Now to the contentions of the parties.

It is the applicant's contention that a clear case for leave has been made out. Mr. Colin Lau of counsel for the applicant submitted that if the Director General goes ahead to make and issue an assessment of income tax payable by the applicant then, for the reasons already given by the applicant, the Director General would be acting in excess of jurisdiction as he would have acted on erroneous principles of law, in that, (i) he employs estimated figures for his re-computation when actual figures are available which demonstrate a loss position; (ii) he would have misconstrued the meaning of Guaranteed Maximum Price, and used this error as the fundamental basis for the estimation of profits; (iii) he would have treated the component parts of the project as separate projects; (iv) he would have disallowed a portion of expenses wholly and exclusively incurred in respect of the project if the contract revenue is taken to be less than the GMP.

Mr. Lau also submitted that if the Director General were to proceed to make an assessment based on the principles outlined by his officers, the Director General would be guilty of acting with 'Wednesbury' unreasonableness and in abuse of powers, in that, he would have failed to take relevant matters into account ie, that the applicant has only obtained an unconditional right to actually receive USD250 million under the contract, and that the applicant has wholly and exclusively incurred expenses in respect of the project amounting to RM1,217 million (equivalent to USD320 million) which are undisputed. On the other hand, says Mr. Lau, the Director General would have taken into account irrelevant matters ie, that the applicant has claims against 1st Silicon for amounts exceeding the GMP, which have yet to be established in an arbitration or court.

Faced with the indisputable fact that the Director General has not as yet made any assessment, Mr. Colin Lau submitted that the court's jurisdiction to grant declaration and other reliefs may be exercised even in cases 'where no traditional wrong has been committed or immediately threatened' but would do so where 'a condition of affairs discloses the existence of a cloud upon the plaintiff's rights, a cloud that endangers his peace of mind, his freedom and his pecuniary interest' (see *Datuk Syed Kechik v. Government of Malaysia* [1979] 2 MLJ 101 (SC)).

Further, faced with the fact that under the Act the applicant may refer for adjudication by the Special Commissioners of Income Tax any dissatisfaction the applicant may have against any assessment made by the Director General, Mr. Lau submitted that where the applicant can demonstrate excess or abuse of power, or a breach of the rules of natural justice, the court would not insist that the applicant exhaust his statutory appeal remedy, but instead grant judicial review (*Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65).

On the hearing of the application for leave, Cik Azizah Nawawi, learned Senior Federal Counsel, appeared on behalf of the Federal Attorney-General to oppose the grant of leave on the following grounds.

Cik Azizah began by pointing out that the Director General has not made nor issued any notice of assessment of income tax against the applicant, and neither has any assertion been made by the applicant in its application that the Director General has made any decision in that regard. Referring to sub-rule (4) of O. 53 r. 2 which reads:

> Any person who is **adversely affected** by the **decision** of any public authority shall be entitled to make the application. (emphasis added)

it was Cik Azizah's submission that to invoke the judicial review powers of the court under O. 53, RHC, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy (see *Council of Civil Service Union & Ors v. Minister for Civil Service* [1984] 3 All ER 935 at p. 936 para 'a to d' and p. 949 para 'e').

Therefore, according to Cik Azizah, there being no decision of the Director General before the court in the sense that no assessment has been made by him under s. 91 of the Act, the applicant has not been adversely affected by any decision of the Director General which is amenable to review by the court. Accordingly, the applicant is not an 'aggrieved person', within the meaning of sub-rule (4) of O. 53 r. 2 and therefore has no *locus standi* to make this application (see *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725).

Cik Azizah next submitted that the applicant's application for leave is premature as the Director General has not made any assessment of the applicant's chargeable income. Cik Azizah further points out that when the Director General does make an assessment and the applicant disagrees with

it, then the applicant may appeal to the Special Commissioners of Income Tax under s. 99 of the Act. And if the applicant is dissatisfied with any decision of the Special Commissioners, then it has a statutory right of appeal to the High Court pursuant to para 34, Schedule 5 of the Act.

Accordingly, Cik Azizah submitted that it would be premature for the court to intervene at this stage and pre-empt the Special Commissioners from performing their statutory function of adjudicating any dispute that may arise between a taxpayer and the Director General. It was Cik Azizah's submission that the court would only take the path which the applicant wishes it to take, if it can be demonstrated to a conviction that there are exceptional circumstances shown which requires the court to do so which, according to Cik Azizah, none has been demonstrated in the present case. (See *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185 at p. 189 para 'D to E' left).

With regard to the complaint of the applicant that if the Director General were to proceed to make an assessment of its chargeable income on the basis of what was disclosed in discussions with the applicant's tax representative, the Director General's decision would be open to challenge on grounds of error of law, jurisdictional error, Wednesbury unreasonableness etc., Cik Azizah says it is idle and speculative for the applicant to talk about the Director General's decision being open to challenge on those grounds when there is in fact no decision before the court that can be said to suffer from such infirmities.

With regard to the applicant's prayer that if it is granted leave to apply for judicial review then the order should also operate as a stay of all proceedings, Cik Azizah points out that in the context of an application for judicial review, there must at the very least be a decision made so that the court may grant a stay of its implementation so as to prevent the consequences that flow from that decision, while it is being reviewed. But Cik Azizah says that here there is simply no decision, the implementation of which requires to be stayed. In support of what she says about the rationale behind a stay being granted ie, to prevent the effects of or implementation of a decision which had already been made, Cik Azizah referred to that part of the decision of the Court of Appeal in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 CLJ 85, which discussed a stay of proceedings. Although the Court of Appeal's decision was reversed by the Federal Court on other grounds, what the Court of Appeal said about stay of proceedings was not. At p. 103 of the judgment this is what the Court of Appeal said (when discussing the difference between an injunction and an order of stay):

> In the context of Order 53 r. 1(5), an order of stay has the effect of temporarily suspending **the effect** of a public law **decision** pending the outcome of *certiorari* or prohibition proceedings brought to challenge the validity of the **particular decision.** (emphasis added).

In response to the Senior Federal Counsel's contention that since no assessment has been made by the Director General there is no decision before the court which is amenable to judicial review, Mr. Colin Lau urged the court not to give the word 'decision' in sub-rule (4) of O. 53 r. 2 a narrow and restricted meaning; otherwise the utility and flexibility of the remedy of judicial review would be greatly diminished. Mr. Lau sought support for his submission by referring to a passage in the decision delivered in *Sivarasa Rasiah v. Badan Peguam Negara* [2002] 2 CLJ 697 where his Lordship Gopal Sri Ram JCA speaking for the Court of Appeal in an appeal arising from a refusal by the High Court to grant leave for an application for judicial review, had this to say about the principles that govern the construction of rules of courts (at p. 706):

> A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice: *Bank of America National Trust And Savings Association v. Chai Yen* [1980] 1 MLJ 198.

Mr. Lau also sought to argue that learned Senior Federal Counsel was relying on a mere technicality in the rules to deny the applicant relief when she submitted that under O. 53 the judicial review powers of the court may only be invoked where there is a decision. Mr. Lau drew attention to the fact that two amendments have been made to our rules of court in the year 2000 to reflect that the courts are more interested to decide on the justice of a case rather than on mere technicalities.

Urging me to interpret O. 53 in a broad and liberal way, Mr. Lau submitted that there is definitely a concrete and existing dispute between the applicant and the Director General which the court should make a ruling on before the Director General makes his assessment or issues a notice in respect thereof. So according to Mr. Lau this application is not premature as alleged. Having dealt with the contentions of the parties, I will now address the merits of this application.

The sole issue for decision at this stage of the proceedings is whether the applicant should be granted the leave that it seeks. The applicant should be granted leave if it passes the threshold test which was adverted to by Edgar Joseph Jr. J (as he then was) in *Dr. Amir Hussein bin Baharuddin v. University Sains Malaysia* [1989] 3 MLJ 298 when dealing with a leave application for judicial review under O. 53 (at p. 299):

> ... in an application for leave, the threshold test is the same: Does the applicant have an arguable case for review, a sufficient interest and has there been undue delay?

Reverting to the facts of our case, the question of undue delay does not arise for decision, but the question of whether the applicant has an arguable case for review and a sufficient interest, certainly does. Before considering those two questions I find it appropriate to remind myself of the principles which guide a court when dealing with an application for leave to commence judicial review proceedings under O. 53 RHC. For this purpose reference may be made to the recent decision of Loh Hop Bing J in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398, where the learned judge very usefully and conveniently set out those principles, when considering an application for leave to bring judicial review proceedings in respect of an assessment to pay real property gains tax which was made against the applicant there by the Director General of Inland Revenue under the Act. What Loh Hop Bing J said about those principles are so relevant and pertinent to this case that I will set out what he said in full. He said (at pp. 402-403):

> [18] It is useful to revisit the principles which our courts have established in dealing with an application for leave to obtain the relief of judicial review by way of *certiorari* under O. 53 as follows:
>
> (1) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such arguments as is necessary on the law.
>
> (2) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
>
> (3) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted: see eg *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 HC, per Visu Sinnadurai J (as he then was); *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 2 MLJ 442 SC, per Edgar Joseph Jr SCJ (as he then was).
>
> (4) The applicant must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application: per Ajaib Singh SCJ (as he then was) in *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 3 MLJ 228 SC.

(5) An application will fail where there is an alternative remedy: *Hongkong & Shanghai Banking Corporation, Ipoh v. Rent Tribunal For Ulu Kinta & Ors* [1972] 1 MLJ 70 FC, per Chang Min Tat J (later FJ); on appeal to the Federal Court per Ong Hock Thye CJ (Malaya), Ali and Ong Hock Sim FJJ (as they then were); *Badat bin Drani v. Tan Kheat* [1953] MLJ 67; *Melayu Raya Press Limited v. WL Blythe The Colonial Secretary* [1951] MLJ 89; *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185 SC. *Lim Kui Siam & Anor, (Representing all the members of Persatuan Penduduk-Penduduk Kawasan Hj Manan, Kluang) v. Pentadbir Tanah, Daerah Kluang* [1995] 1 CLJ 846; and *T Mohan a/l Ellen & Ors v. Pentadbir Tanah Daerah Petaling* [2000] 2 MLJ 431 per Abu Samah J.

(6) Where there is an alternative remedy of appeal, leave to issue *certiorari* will only be granted in exceptional circumstances such as:

(a) a clear lack of jurisdiction;

(b) a blatant failure to perform some statutory duty;

(c) a serious breach of the principles of natural justice: see eg *National Land Finance Co-operative Society Ltd v. Ketua Pengarah Hasil Dalam Negeri* [1998] 4 CLJ Supp 232 HC; per Nik Hashim J (now JCA);

(d) illegality: *Majlis Perbandaran.*

(7) The categories of exceptional circumstances are not closed, and the burden is on the applicant to prove the existence of any of the exceptional circumstances: *Lim Kui Siam.*

Reverting to the issue at hand, in my judgment it must follow that unless the applicant can show that the Director General has made a 'decision' within the meaning of that word in sub-rule (4) of O. 53 r. 2, the applicant does not pass the threshold test because the applicant cannot then be said to have an arguable case which needs further investigation on a full *inter-partes* basis, nor does it have a sufficient interest since it is not 'adversely affected' by the decision of a public authority.

In urging the court to give O. 53 a broad and liberal reading so that the word 'decision' will include a purely factual situation where no decision has yet been made on a matter in issue between two parties, as is the case now before the court, Mr. Colin Lau relied on the following arguments. He first said that O. 53 makes no mention of when the decision is to be made ie, before or after O. 53 is invoked. Mr. Lau's second argument was that the provisions of O. 53 r. 3(6) which relates to the time for making the application, provides a clue how the word 'decision' should be construed. Order 53 r. 3(6) reads:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when the **grounds for the application** first arose, **or** when the **decision** is first communicated to the applicant ... (his emphasis).

It is Mr. Lau's submission that since the words 'grounds for the application' are used in contra-distinction to the word 'decision' in the same rule, it is reasonable to infer that the Rules Committee had intended that judicial review could be invoked prior to a decision, if there were sufficient grounds for the application.

Mr. Lau's third argument was that his interpretation is also consistent with the provisions of O. 53 r. 3(5) which provide that 'the grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question'. According to Mr. Lau the use of the expression 'proceedings' in the sub-rule is a good indication that it is wide enough to encompass the proceedings leading up to a decision, as well as the implementation of the decision.

Mr. Lau's fourth argument was that there is case law to support his contention that the word 'decision' encompasses a wide spectrum of factual situations, as judicial review has been available to review circulars, advice and opinions which in many cases preceded a decision in the narrow sense (see *Hajjah Halimatussadiah bt Hj Kamaruddin v. Public Service Commission* [1994] 3 CLJ 532; *Noh bin Abdul Aziz v. Director of Lands and Surveys, Kota Kinabalu* [1999] 6 MLJ 772 at p. 791; *R v. Boycott* [1939] 2 All ER 626 at p. 627-628).

I must at once say that I do not agree with these arguments. With reference to Mr. Lau's first, second and third arguments which concern a matter of interpretation, I agree with him that O. 53 should not be read in such a way as to deprive it of its vitality and flexibility as a remedy, but on the facts of this case it would be wrong to give the word 'decision', such a tortured or artificial meaning just so that a factual situation which clearly cannot, by any stretch of the imagination, be described as a decision, is in fact regarded as one. The court would clearly be in danger of doing just that here if it accedes to Mr. Lau's contention that a mere indication by officers of the Inland Revenue Board as to how they compute the applicant's chargeable income constitutes a decision in the sense of an assessment made by the Director General of the tax payable by the applicant. On her part, the learned Senior Federal Counsel has given the word 'decision' its plain ordinary meaning. As there is no ambiguity in that word, I cannot fault her for doing so as it is a rule of interpretation that a court must give effect to the plain ordinary meaning of words unless this produces an absurd result that cannot reasonably be supposed to have been intended by the Rules Committee, in which event a

secondary or extended meaning which they are capable of bearing may be attributed to them. Here, it is not difficult to see that by giving the word 'decision' its plain and ordinary meaning, no absurdity results whereas if an extended meaning is given to it such absurdity will result. Further, for the same reasons, neither can it be said that by giving to the word its plain ordinary meaning, a rule of court has been interpreted in such a way as to result in unfairness or produce a manifest injustice.

Quite apart from the above, to answer the specific arguments raised by Mr. Lau, in my judgment it was not necessary for O. 53 to mention when the decision is made because it is logical to conclude that there must be a decision in the first place before a party can say that it is adversely affected by it. With reference to Mr. Lau's second and third argument, I do not think the use of the words 'grounds for the application' and 'the proceedings' in O. 53 r. 3(5) and (3) respectively, are of any assistance in interpreting the word 'decision' in O. 53 r. 2(4) because those words are being used in a completely different context from the word 'decision' in r. 2(4), and it is a rule of interpretation that a word must take its meaning from the context in which it is being used.

With reference to Mr. Lau's contention that the word 'decision' encompasses a wide spectrum of factual situations, I cannot agree with this contention because firstly, each case must be examined on its own facts to determine whether a decision has been made which adversely affects the applicant. Secondly, when the cases that are relied on by Mr. Lau in support of his contention are looked at closely, they do not support the proposition he makes because they show that some form of decision or 'sub-decision' (which was the expression used in one case) had been made which was amenable to judicial review, or that some definite right, status or privilege which had been acquired by the applicant, was in danger of being denied.

Thus, in *Hajjah Halimatussadiah bt Hj Kamaruddin v. Public Service Commission* [1994] 3 CLJ 532, the appellant there had been dismissed by the Public Services Commission. She filed a writ action to have her dismissal declared null and void on grounds that a circular which had been issued by a government department prohibiting lady civil servants from wearing attire covering their face during office hours was unlawful etc. But there was still a decision of dismissal in that case.

In *Noh bin Abdul Aziz & Anor v. Director of Lands & Surveys, Kota Kinabalu* [1999] 6 MLJ 772, the applicant there filed a motion to quash the decision of the 1st respondent to cancel Request for Survey Plan (RSP) on the grounds that the decision was made in excess of jurisdiction etc. One of the issues before the court there was whether a decision had been made by the 1st respondent which was amenable to review by the court. The court decided at Held [3]: that there must be a decision which must be identified with precision in the application. So that case is of no assistance here.

In *R v. Agricultural House Advisory Committee for Bedfordshsire, Cambridge and Northamptonshire ex-parte Brough* 19 HLR 367, a special committee had been appointed under s. 29 of the Rent (Agriculture) Act 1976 to advise the local housing authority on applications for possession of houses. The special committee had made a recommendation which would have strongly influenced the local housing authority to arrive at a decision on whether a house occupied by the ex-employee of the applicant should be vacated or not. However, while the special committee were holding their own proceedings to determine what their recommendation would be, procedural improprieties had occurred. So the applicant there applied for judicial review before the local housing authority could act on the recommendations made by the special committee. The court held that there was no need to wait until the local housing authority had acted on the recommendation of the special committee, and that judicial review was available because the recommendation, which was procedurally flawed, was nevertheless a 'sub-decision' which would play a part in the making of the decision as a whole. This case can be of no assistance to the applicant here because firstly, the Director General acts on his own accord in making his assessment, without having to take into account the recommendations of any special committee set up for that purpose and secondly, there is no sub-decision made in this case which can be said will strongly influence the Director General in making his assessment. I would certainly not regard the action of the officers of the Inland Revenue Board in revealing to the applicant's tax representatives during discussions with them that the applicant's tax liability is computed on certain principles which the applicant disputes, and the refusal of the officers of the Inland Revenue Board to budge from those principles, as anything resembling a decision or sub-decision within the meaning of O. 53 r. 2(4). If this were not the case then I agree with Cik Azizah that the court would be in danger of being flooded with applications for judicial review simply made on the basis that from meetings held between a taxpayer and officials of the Inland Revenue Board, it is apparent that each party hold different views on principles of taxation, which in turn would effectively prevent the Director General from collecting taxes.

In *R v. Boycott* [1939] 2 All ER 626, a certification together with related documents regarding the mental condition of a minor had been issued by two doctors which would have resulted in the minor being treated as an imbecile and being transferred from a normal school to a special school. The applicant there, as father of the infant, sought to have the certification quashed which was resisted on the ground that the documents sought to be quashed arose from administrative acts, and did not arise from a judicial authority. However, the court held that *certiorari* would lie because the certification complained of was created in a way that it took the form of a decision of a quasi-judicial authority. So that was a case in which some form of decision or sub-decision had been made, unlike the case here.

In *The King v. Electricity Commissioners* [1924] 1 KB 171, a scheme for the incorporation of a joint electricity authority had been formulated, but the approval of the Minister and of Parliament was required before it was put into effect. Certain companies were unhappy with the scheme and so applied for prohibition and *certiorari*. The court held that the scheme was *ultra vires* the powers of the Commissioners. But it is important to note that although in that case judicial review was applied for even before the approval of the Minister and Parliament had been obtained, what was being impugned was the decision to formulate the scheme which, needless to say, is not the case here.

In *Datuk Syed Kechik v. Government of Malaysia* [1979] 2 MLJ 101 (SC) the plaintiff issued an originating summons seeking to have it declared that he was a person belonging to the State of Sabah and that his right to permanently reside in Sabah could not be cancelled. Prior to the action the plaintiff had already been issued an Entry Permit entitling him to reside permanently in Sabah as well as with a Sijil Anak Negeri of Sabah by a Native Court which status accorded him certain privileges as a Native of Sabah. There was a move by the Government of Sabah to deny him his status as a permanent resident and an Anak Negeri of Sabah, so the plaintiff went to court to have his rights declared. Having been issued with an Entry Permit and a Sijil Anak Negeri the *locus standi* of the plaintiff to apply for the declarations he sought was not in question, and neither was his application regarded as being prematurely made as he was seeking declarations to protect a status and rights which he had already acquired, and over which 'a cloud' had appeared. This is certainly not the position here where no decision has been made by the Director General regarding the applicant's tax liability and so its *locus standi* to make this application is seriously in doubt. Quite apart from the above, it might be asked: What status or right had the applicant acquired as a taxpayer which required to be protected by declaratory orders, so that this application cannot be said to be premature? In my respectful view, the applicant has acquired none. In support of what I say I refer to *Arumugam*

Pillai v. Government of Malaysia [1975] 2 MLJ 29 where the Federal Court said (in the context of an application for prohibition) that taxation is an independent power of the State and a taxpayer has no fundamental right to immunity from taxation, which according to the Federal Court, was presumably why no constitutional protection is provided against the exercise of that power to tax. So I agree with Cik Azizah that the applicant here has not acquired any status or right against the Director General *vis-a-vis* the Income Tax Act which requires to be protected.

For the reasons above, I agree with learned Senior Federal Counsel that in the absence of a decision by the Director General, the applicant not only lacks a sufficient interest or *locus standi* to make this application, but that its application is premature in the circumstances.

As to Mr. Lau's submission that the court should not accede to purely technical objections to defeat the rights of the applicant, I do not agree with this submission or that this is what the learned Senior Federal Counsel or the court seeks to do in this case. Far from being a mere technicality, the requirement for there to be a decision or at the very least a sub-decision of some sort or the lack of it, or of an existing right or status of some sort which is being denied or threatened, is a matter that goes to the very foundation or basis of the application for judicial review under O. 53 and so cannot be considered as a mere technicality.

I now turn to consider the principle stated in *Government of Malaysia v. Jagdis Singh* [1987] 2 MLJ 185 (SC) ie, that the court retains a right to judicially review the decision of a public authority, but where there is an alternative remedy of appeal, leave to bring judicial review proceedings will only be granted in exceptional circumstances. I accept it that the categories of exceptional circumstances are not closed and that each case must be decided on its own facts. Since the Act provides to the applicant an avenue to appeal against any decision which the Director General may make, has the applicant shown that there are exceptional circumstances warranting the court's intervention at this stage?

According to Mr. Lau, the applicant has demonstrated that if the Director General proceeds to make an assessment on the basis indicated by the officers of the Inland Revenue Board during meetings held with them, then the Director General will have committed errors of law, abuse of power, Wednesbury unreasonableness etc which the courts now regard as jurisdictional error, which, according to Mr. Lau, was accepted as constituting an exceptional circumstance in *Jagdis Singh*'s case.

I cannot agree with this submission. In making the assessment the Director General is doing what he is authorised to do under the Act and there is nothing exceptional about the Director General making an assessment on the basis of certain principles he believes is right but which the taxpayer does not agree with, because it is only to be expected that the taxpayer will not always agree with the basis upon which he is assessed to tax – hence the special avenue of appeal to the Special Commissioners under the Act.

Further it is clear to me in *Jagdis Singh*, that the then Supreme Court was not referring to what is nowadays popularly referred to as an error of law that goes to jurisdiction as coming within the expression 'exceptional circumstances' because in *Jagdis Singh*, Hashim Yeop Sani SCJ spoke about 'a clear lack of jurisdiction', ie, the decision maker acting without jurisdiction in the true sense of the word, a good example of which is the case of *General Commissioners for Purposes of Income Tax For Kensington v. Aramoyo* [1916] AC 215 where the court there granted an order of prohibition against the Commissioners For Kensington from raising taxes in respect of an area, namely, the City of London, which came under the jurisdiction of the Commissioners of the City of London for tax purposes, because the Commissioners For Kensington were clearly acting outside their jurisdiction or with lack of jurisdiction in the true sense of the word.

For all the reasons discussed above, I find that the applicant has failed to satisfy the threshold test – it has failed to show an arguable case for review; it has not shown a sufficient interest to make this application, which is premature. In that sense this application can be said to be frivolous and vexatious and an abuse of the process of the court.

Since I agree with Cik Azizah that the purpose behind the grant of a stay is to suspend the effects of or to prevent the consequences that flow from a decision, and since I have found that there has been no decision made in this case which is amenable to judicial review, and neither has an arguable case been made out for review, the question of stay does not arise. Likewise, since the applicant's prayer for prohibition is ancillary to the declarations it seeks, it does not arise for consideration in view of my earlier finding.

In the result I dismiss the application for leave with costs in favour of the Federal Attorney-General.